Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Amendment to the Commission's Rules	)	WT Docket No. 95-157
Regarding a Plan for Sharing	)	RM 8643
the Costs of Microwave Relocation	)	

REPLY COMMENTS OF OMNIPOINT CORPORATION

Omnipoint Corporation, by its attorneys, hereby replies to the comments filed in the above-captioned proceeding.

In the First R&O and Further Notice,[1] the Commission proposed to change the negotiation period for microwave relocation applicable to PCS Block C, D, E, and F licensees by reducing the voluntary negotiation period and, correspondingly, increasing the mandatory negotiation period by one year While this is a quite modest change to the rules in light of the microwave incumbents' abuses documented in this proceeding, several parties object to this alteration. These objections are grounded in the misperception that mandatory negotiations will jeopardize life or safety or that the Commission vested microwave incumbents with a right to special premiums before they transition to re-allocated spectrum. As explained below, Omnipoint urges the Commission to eliminate the voluntary negotiation period. In short, one FCC licensee should not have to pay another FCC licensee for timely and good faith negotiation that is critical to implement the greater public policy goal of deploying new competitive services in mobile communications.

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1 First Report and Order and Further Notice of Proposed Rule Making, WT Dkt. No. 95-157, RM-8643, FCC 96-196 (rel. Apr. 30, 1996) ("First R&O and Further Notice")

Good-Faith Negotiation Is Not Too Much To Expect From All Licensees

The Commission's current rules for relocation of microwave incumbents during the voluntary period offer incumbents too much opportunity for mischief -- "[d]uring the two or three year voluntary negotiation period, negotiations are strictly voluntary and are not defined by any parameters." 47 C.F.R. § 101.71. This legal framework creates a tremendous problem for orderly transition of the 2 GHz spectrum from fixed microwave to commercial mobile. Instead of facilitating relocation, it encourages incumbents to delay relocation until the PCS licensee pays an exorbitant fee or rent for the incumbent to negotiate for relocation. Without payment of the fee or rent, the Commission's rules provide the incumbent with no economic incentive, and not even the legal obligation, to attempt relocation during the voluntary period. This economic reality has borne itself out in the Block A and B relocation process, as was shown in the initial round of comments in this proceeding. While some incumbents posit in a self-serving way that they have not delayed orderly relocation, none of the commenters can dispute that, without payments of extraneous premiums, the current rules create an economic disincentive for incumbents to negotiate in good faith now, during the voluntary period, as opposed to years later, in the mandatory period. The fact that PCS entrants, especially Block C and F small businesses, will have to pay millions to incumbents merely to bring them to the negotiating table will inevitably cause slower and more complex negotiations, it raises the transactions costs of relocation, and delays the date of commercial launch of PCS systems. This is aside from the fact that such extraneous premiums are nothing but outright pay-offs. Rather than supporting this negotiation roadblock, the Commission's rules should encourage economically efficient, early and orderly transition of the 2 GHz band for commercial mobile use. The voluntary negotiation period should be eliminated because it is completely at cross-purposes with those goals. Instead, the Commission should replace voluntary negotiation with mandatory, good-faith negotiation between the parties.

Mandatory negotiation essentially requires all FCC licensees to negotiate in good faith. It does not threaten public safety, nor does it force incumbents to relocate in a great panic (or even within one year), to accept an inferior replacement system, or to expend significant internal resources. Under the rules as adopted in the First R&O and Further Notice, mandatory negotiation would change just one issue for the microwave incumbent (and the PCS licensee) -- "[o]nce mandatory negotiations have begun, an F[ixed] M[icrowave] S[ervices] licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process." 47 C.F.R. § 101.73(b).

Omnipoint believes it is not too much to ask that, as FCC licensees operating in the public interest, microwave incumbents come to the negotiating table in good faith, especially after four years notice that the FCC, fully within its authority, has re-allocated the 2 GHz band for commercial mobile use. Good faith negotiation, as proposed in this proceeding, will primarily accrue to the benefit of small businesses in the C and F band (and perhaps the D and E bands), and the American consumer as new PCS entrants provide innovative services that drive mobile telephony prices to competitive levels. At the very least, the incumbents' adamant objections against good faith negotiation demonstrate an outright hostility to the spectrum re-allocation decision itself, which has been affirmed and reaffirmed both by the Commission and the D. C. Circuit.[2] As APCO put it, "Enough is enough," Comments of APCO at 7, it is time for incumbents to come to the table in good faith, relocate, and clear the 2 GHz band for commercial mobile use.

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2 First Report and Order, ET Dkt. No. 92-9, 7 FCC Rcd. 6886 (1992); Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. 6589 (1993); Memorandum Opinion and Order, 9 FCC Rcd. 1943 (1994); Second Memorandum Opinion and Order, 9 FCC Rcd. 7797 (1994); APSCO v. FCC, 76 F.3d 395 (D.C. Cir. 1996).

Objections to immediate good-faith negotiation raised by microwave incumbents in their comments are easily dispelled:

a. Good Faith Negotiations are not a Danger to Public Safety

Judging from some comments, an obligation for microwave incumbents with "public safety" status to negotiate in good faith would itself threaten public safety. *See e.g.*, Comments of APCO at 3 (negotiations "pose a potential for disruption to vital emergency communications operations."); Comments of Los Angeles County Sheriff's Department at 3 (negotiations "could cause disruption and harm to public safety and other critical communications services.").

These vague claims misrepresent the impact of eliminating the voluntary negotiation period. With mandatory negotiation, no public safety licensee is forced to respond without adequate time to consider proposals from PCS operators; to the contrary, it merely requires them to respond in a reasonable manner to reasonable proposals. Obviously, public safety agencies will need to abide by their own internal procedure to obtain agency approval and guidance on relocation proposals as they arise. No one is suggesting that the obligation to negotiate in good faith should force public agencies to deal with issues so expeditiously that they neglect their other important duties. The overstated claims by some microwave incumbents leaves the unrealistic impression that public safety is so frail it cannot withstand even the obligation to review and accept a reasonable relocation offer.

While it does not impact public safety, the relocation of 2 GHz links through the mandatory negotiation process will leave the microwave incumbent at least as well off, and in some cases better off, than its current position. As the Commission explained and codified in its rules, a relocation through mandatory negotiation will deliver to the incumbent "comparable facilities" that meet or exceed its current system parameters in terms of (1) throughput, (2) reliability, and (3) operating costs. First R&O and Further Notice, at ¶ 21; 47 C.F.R. §§ 101.73(b)(1), 101.75(b). The Commission's rules even permit reasonable demands for "premiums" during the mandatory negotiation period, id. at § 101.73(b)(2), and contractual

provisions for a trial period for the replacement link(s). First R&O and Further Notice, at ¶ 47; *see also*, APSCO v. FCC, 76 F.3d at 399 ("the provisions guaranteeing that no incumbent will be required to move until the new PCS licensee builds, tests, and assumes all costs for fully comparable facilities for the incumbent, renders debatable [APSCO's] claim that public safety providers are significantly injured by the new policy. . . . the Commission points out that the end result - brand new facilities fully paid for by a PCS licensee - will often leave the incumbent better off after relocation.").

b. Timely Deployment of Impending PCS Block C, D, E, and F Systems is Significantly Threatened by Microwave Incumbents' Refusal to Negotiate in Good Faith

Some incumbents attempt to cloud the issue of their refusal to commit to good faith negotiation by asserting that there is really no problem with the current voluntary negotiation period. *See, e.g.*, Comments of American Public Power Association ("APPA") at 2; Comments of Association of American Railroads at 2. Tenneco Energy goes on to assert that there is no record evidence that voluntary negotiation, as compared to mandatory relocation, has slowed relocation and that the only way to measure such an effect is to wait until April, 1998, when both periods have expired for A and B licensees. Comments of Tenneco Energy at 2.[3]

These claims are at odds with the significant evidence that commenters presented to the Commission in the comments and reply comments leading to the First R&O and Further Notice. *See, e.g.*, Comments of Omnipoint Communications, Inc. at 6 (Nov. 30, 1995); Comments of PCIA at 2-11 and attached exhibits (Nov. 30, 1995); Comments of CTIA at Exhibit I (Dec. 1,

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3 Tenneco's argument is essentially tautological. The Commission's proposal is to change the existing rules; therefore, its response that the Commission should retain the rules to test the efficacy of a change does not address the issue. Moreover, Tenneco's proposal would in no way measure the additional benefits of a *current* change to the rules, which is the issue in this proceeding.

1995); Comments of Sprint Telecommunications Venture at 4-7 (Nov. 30, 1995); Comments of AT&T Wireless Services, I at 3, 15 (Nov. 30, 1995); Comments of PCS PrimeCo, L.P. at 16 (Nov. 30, 1995). While the Commission unfortunately chose to ignore the evidence of microwave incumbents abusing the voluntary negotiation period with A and B licensees, there is no reason to believe that incumbents will not again attempt to wrest enormous pay-offs from Block C, D, E, and F licensees when they too come to the negotiating table. With knowledge of the problem and every indication that it is likely to recur, the Commission should do everything it can in this proceeding to prevent that outcome. FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1984) ("the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."); Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) ("the agency cannot sidestep a reexamination of particular regulations when abnormal circumstances make that course imperative").

It is particularly important to modify regulations that will likely add to the delay of Block C, D, E, and F PCS system deployment. These licensees will be the last to market in a highly competitive commercial mobile service environment; deployment delays -- such as microwave incumbents that refuse good-faith negotiation -- only exacerbate the problem. Moreover, many of these licenses are reserved for small businesses. Both the Commission and Congress have declared a public commitment to ensuring that regulations encourage long-term opportunities for small businesses in telecommunications. 47 U.S.C. §§ 257(a) & 309(j)(4)(D); Fifth Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 5532, 5589 (1994) ("Our goals are to create significant opportunities for entrepreneurs, small businesses . . . to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service."); Second Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 2348, 2389 (1994) (auction preferences and licensing for small businesses are to "enable the participation of a variety of entrepreneurs in the provision of

wireless services"). Reforming the relocation rules will certainly promote small businesses entry in the PCS market.[4]

c. Incumbents are not Entitled to a Windfall as Part of the Relocation Process

At its core, the microwave incumbents resist change of the relocation rules, and a requirement that they negotiate in good faith, because the current rules provide them with an opportunity to extract money or other benefits from PCS licensees that are, in fact, unrelated to the process of relocation or the assurance of "comparable facilities." Some incumbents even boldly assert their right to this largesse. For example, the American Public Power Association argues that the Commission should not require good-faith negotiation because it would "give PCS licensees an additional competitive advantage in market-based negotiations." Comments of APPA at 5.[5] Tenneco claims that it would be unfair to change their rights under voluntary negotiations because incumbents "bargained for the existing rules before the Commission in earlier proceedings" in a "negotiated regulatory regime." Comments of Tenneco Energy at 3.

These claims bear out how distorted the microwave relocation process has become. What started out as a method of implementing effective relocation without the need for Commission

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4 We note that PCS PrimeCo's opposition to the Commission's proposed changes for Block C, D, E, and F licensees contradicts PCS PrimeCo's earlier position in this docket. *See* Comments of PCS PrimeCo, L.P. at 15-16 (filed Nov. 30, 1995) ("The microwave relocation rules are unfair to PCS licensees. . . Those microwave operators who have accepted the rules' invitation to gouge continue to pose a threat to the development and deployment of PCS and to the government's new policy of spectrum auctions. . . . PrimeCo therefore urges the Commission to reconsider the two-year 'voluntary' negotiation period . . . ").

5 Similarly, APPA claims that changes adopted in this proceeding would amount to a "retroactive" modification of the Commission's rules. Comments of APPA at 2, 5. However, the proposed amendment would have no retroactive effect on the relocation process for Block C, D, E, and F because (a) Block C mandatory relocation would simply change from May 22, 1998 to May 22, 1997, and (b) Block D, E, and F relocation periods have not even been set. Under the circumstances, the Commission may also eliminate the voluntary period on a going-forward basis.

oversight has grown into an expectation on the part of incumbents that they are entitled to a pay-off prior to relocation. Suffolk County's request for Omnipoint to give it an $18 million cash payment as a "revenue inducement" for relocation during the voluntary period is yet another example. Comments of Omnipoint Communications, Inc. at 6 (Nov. 30, 1995). However, the relocation rules, as described in the Commission's orders, were never intended as a wealth transfer mechanism. Therefore the microwave incumbents have no legitimate expectation that the Commission will protect their abusive practices by maintaining the current rules. As the D.C. Circuit recently explained while incumbents may have enjoyed financial interests during the voluntary negotiation period through forcing PCS licensees "to pay extraordinary costs, or 'rents,' . . . their loss of rent-seeking potential is hardly a cognizable injury for consideration either by the FCC or by this court since their place on the spectrum was originally derived from a grant from the government." APSCO v. FCC, 76 F.3d at 399 n.5.

For the foregoing reasons, Omnipoint urges the Commission to eliminate the voluntary negotiation period with microwave incumbents for PCS Block C, D, E, and F licensees.

Respectfully submitted,

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